been deceived by the fraudulent practices of the attendant or others.

These principles can readily be applied to the case under discussion, for just as the ability to read the time-table was a most important element in ascertaining the competency of the switchman; so was the ability to comprehend English an essential qualification for the catcher, for by lacking this knowledge, he could not obey his orders and as a result, the accident occurred. Probably the case most analogous to this one is *Lantry & Sons v. Lowrie,* decided by the Texas Court of Civil Appeals in 1900; 58 S. W. 837. It was there held that the liability for an injury occasioned by the employment of a co-laborer of a low order of intellect, and one who could not understand the English language, in a position in which the co-operation of the laborers was necessary, where the evidence was conflicting as to whether the injury was due to ignorance or carelessness, was a question which should be submitted to the jury.

Thus, both by weight of authority and good reasoning, the court seems to be justified in rendering this decision, and although it may cause employers to be more diligent in selecting men who will be competent for their positions, nevertheless, it seems to be only a logical deduction from the previous decisions on this doctrine, which must develop as labor and capital become more diversified.

LIABILITY OF CHARITABLE CORPORATION FOR TORTS OF ITS AGENTS.

Within a few months the Appellate Division of the Supreme Court of New York was called upon to decide the question as to whether a charitable corporation is liable to answer in damages for torts committed by its agents. The particular delict in the case of *Kellogg v. Church Charities Foundation of Long Island,* consisted in negligence on the part of the defendant's servant. The trial court dismissed the complaint at close of evidence, and the Appellate Division reversed this in a lengthy, elucidative and logical opinion reported in 112 N. Y. Supp. 566.

The cases of actions against public eleemosynary corporations of this sort are usually divided into two classes, first, suits arising by reason of negligence on the part of physicians doing work gratuitously for the institution, and second, those arising through negligence of its servants properly speaking. The reasoning of the line of demarcation is somewhat vague and illogical, but such

as it is, such a distinction is clearly drawn in the principal case. And in this case the Appellate Division permitted the plaintiff to recover, notwithstanding that such recovery might result in the depletion of trust funds in satisfying the judgment. That is the reason usually advanced by the courts which refuse to permit a recovery in such cases, following *McDonald v. Mass. Gen. Hospital,* 120 Mass. 432 (decided in 1876), which was the first reported case in this country on this subject. The McDonald case followed the case of *Feoffees of Heriot Hospital v. Rees* (decided in 1846), and reported in 12 Clark and Fin. 507. The court there held that one could not recover from a charitable corporation for acts of its agents under the *respondeat superior* doctrine, on the theory that to so permit would result in the depletion of trust funds and the diversion of the funds from the purposes for which their donors gave them. Whether that case is law in England to-day is doubtful. That it was not overruled by *Mersey Docks v. Gibbs,* L. R. 1 H. L. 93, is the statement made in *Fire Patrol v. Boyd,* 120 Pa. St. 649 (1888), in a decision disaffirming the contentions upheld in the principal case, but that the Pennsylvania court must have been wrong becomes apparent at once when we read from the opinion of Justice Blackburn in *Foreman v. Mayor of Canterbury,* L. R. 6 Q. B. 214 (1871), wherein he says: "*Holliday v. St. Leonard's* follows the *Heriot case,* in that it decides that a body like a local board of health who were made surveyors of the highway, were not responsible for negligence of those who were their servants; but upon looking at the reason of the decision we consider it overruled in the case of *Mersey Docks v. Gibbs, supra.* It is not overruled by name but the principle upon which that case was decided in the House of Lords does overrule it, because it was decided that a public body, like a board of health, are answerable for the acts of their servants, just as if they were acting as the servants of a private person, and not for a corporation incorporated for a public purpose. Of course, the individuals composing the body are not responsible, it is the local board of health that are responsible, and they would have to pay the damages out of the funds in their hands as a local board of health." If this be so, it would appear that the *Heriot case* is no longer law in England, the Pennsylvania court's view to the contrary notwithstanding.

Whatever be the law in England, undoubtedly it has been held in some six or seven states in this country that a charitable cor-

poration is not liable for torts committed by its agents. It has been so decided in Massachusetts, Kentucky, Maryland, Pennsylvania, Michigan, Virginia, and Connecticut, and as far as these states, and Rhode Island where the contrary has been held, are concerned, any discussion of this question must be purely academic.

The holding of the Connecticut Supreme Court of Errors is refreshing for its frank reasoning, in *Hearns v. Waterbury Hospital,* 66 Conn. 98 (1895), where it said: "It is, perhaps, immaterial whether we say that the public policy which supports the doctrine of *respondeat superior* does not justify such extension of the rule, or say that the public policy which encourages public enterprises for charitable purposes requires an exemption from the operation of the rule based on legal fiction, and which, as applied to the owners of such enterprises is clearly opposed to substantial justice. It is enough that a charitable corporation like the defendant, whatever may be the principle that controls its liability for corporate neglect in the performance of a corporate duty, is not liable on grounds of public policy for injuries caused by personal wrongful neglect in the performance of his duty by a servant whom it selected with due care, but in such case the servant is alone responsible for his own wrong. This result is justified by *Hall v. Smith,* 2 Bing. 156; *Holliday v. St. Leonard,* 11 C. B. N. S. 192, and *Union Pacific Railway Co. v. Artise,* 60 Fed. 365, substantially upon the grounds above stated and is reached *for one reason or other* (the italics are ours) by the greater number of courts that have dealt with the particular liability of a corporation for public or charitable purposes."

The logic of this, *i. e.,* its bold acceptance of the doctrine "for one reason or other," is better than that in the McDonald case, *supra,* where it is held that exemption exists lest there be a depletion of trust funds, and that the rule applies only so long as the corporation used due care in the selection of its servants. The query naturally suggests itself, that if, as the court suggests, the eleemosynary corporation is guilty of negligence in selecting its agents, and a liability subsequently ensues therefrom, then, are not the trust funds depleted and used for a purpose different from that for which they were raised? The court did not meet this view at all. And the next question which properly arises is, how will the court deal with suits on contract violation by public corporations,

as far as the argument concerning depletion of trust funds is concerned. We merely suggest this as deserving of thought.

It is submitted that the reasoning in *Glavin v. R. I. Gen. Hospital,* 12 R. I. 411 (decided in 1879), three years after the McDonald decision is infinitely better. There the court said: "In our opinion, the argument will not bear examination. The public is doubtlessly interested in the maintenance of a great public charity such as the hospital is, but it also has an interest in obliging every person and every corporation that undertakes the performance of a duty to perform it carefully, and to that extent therefore it has an interest against exempting any such person, and any such corporation from liability for its negligence. The court cannot undertake to say that the former interest is so supreme that the latter must be sacrificed to it. Whether it shall be or not is a question, not for the court, but for the legislature."

This reasoning seems better than that advanced in the McDonald case. For in that case and the line of cases that follow it, a liability is admitted to exist if the corporation failed to use reasonable care in selecting its agents. If liability exists in such case, how, we repeat with full deference to the learning of the courts that have adopted that view, will there be any the less a depletion of trust funds, if recovery is permitted for negligence, in such cases as the corporation has been careless in selecting its agents? And why, admitting for purposes of argument the logic of such reason, should depletion of trust funds be permissible in the one event and not in the other? These questions appear unanswerable.

Moreover, we are unable to see how it will follow that the permitting of suits in these cases will necessarily result in the depletion of trust funds. It is a matter of common knowledge that such charitable corporations have other sources of revenue than these trust funds, and no valid reason suggests itself why such revenues should also be preserved intact from execution on a judgment.

It is readily admitted that the buildings of such corporations as are used for public purposes, having been dedicated for such use, must be exempt from execution and attachment, but that is no reason why property not so appropriated and dedicated should not be liable, such property for example as annual state appropriations, current receipts from patients, etc.

If the doctrine of *respondeat superior* is to be upheld, and

after such long acquiesence, it cannot ever be called into question, we are unable to see how courts can consistently refuse to admit the liability of public corporations for the delicts of their servants. For if the doctrine be in force, the reasons for its enforcement in such cases is as strong as in any case of principal and agent, whatsoever. And the very same reasons are applicable. Refusing enforcement, a premium is put upon official carelessness in the case of charitable corporations, which would never be permitted to exist in any other case of similar relation.

It will be interesting to see how the Court of Appeals of New York will dispose of this troublesome question, whether it will follow the clear reasoning of the Glavin case, *supra,* or fall in with the majority holding, the logic of which is so assailable.

H. F.

STATE PROHIBITION LAWS APPLIED TO UNITED STATE MAILS.

The right of a state to punish for infractions of its criminal laws by residents of other states, when the mails are used as a medium, is upheld by the Court of Appeals of Georgia in *Rose v. State,* 62 S. E. 117.

The defendant, a corporation doing business in the state of Tennessee, mailed to residents of Bartow county, Georgia, circulars advertising their various brands of intoxicating liquors, and invited orders, enclosing a self-addressed stamped envelope. The letters were received in due course of mail by the persons to whom they were addressed in Bartow county, Georgia, and the venue of the crime alleged is there laid. It is charged that defendant violated Section 428 of the Penal Code of Georgia, which prohibits the "soliciting, personally or by agent, the sale of spirituous liquors, where the sale of such liquors is prohibited by law." By recent legislative enactment the sale of intoxicating liquors is entirely prohibited within the state of Georgia.

This is a case of first impression to the extent that such a prohibition may be extended to the use of the mails as a medium of solicitation, but it appears to be supported by analogous decisions of the Supreme Court of the United States.

That a state may prohibit, within its borders, the solicitation of orders, for intoxicating liquors, cannot be denied. And under the terms of the *Wilson Act* (U. S. Comp. Stat. 1901, p. 3177), although a state may not forbid a resident therein from ordering